

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LANDSCAPE CONSULTANTS OF
TEXAS, INC., and
METROPOLITAN LANDSCAPE
MANAGEMENT, INC.,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, and
MIDTOWN MANAGEMENT
DISTRICT,

Defendants.

Civil Action No. 4:23-cv-03516

**CONCISE SUMMARY OF
POINTS IN PLAINTIFFS'
OPPOSITION TO DEFENDANT
MIDTOWN MANAGEMENT
DISTRICT'S MOTION TO
DISMISS**

In support of its Opposition to Defendant Midtown Management District's (MMD) Motion to Dismiss, Plaintiffs Landscape Consultants, Inc. (Landscape Consultants), and Metropolitan Landscape Management, Inc. (Metropolitan) (collectively, Plaintiffs), state the following:

1. Landscape Consultants has standing. Landscape Consultants alleges an inability to compete on an equal footing in MMD's bid program, which constitutes an "injury in fact" in a forward-looking equal protection challenge to a racial bid preference program and satisfies both injury and traceability for Article III standing. *N.E. Fla. Chapter of Associated General Contractors of America v. City of*

Jacksonville, 508 U.S. 656, 666 (1993); ECF No. 1 at ¶¶ 7, 45. MMD does not dispute redressability.

In its section 1981 claim, Landscape Consultants’ claim that MMD’s race-based bid program prevents it from competing equally for contracts due to the race of its owner “falls within the statute’s zone of interests,” and there is no question its “alleged injuries were proximately caused by violation of the statute.” *White Glove Staffing, Inc. v. Methodist Hospitals of Dallas*, 947 F.3d 301, 307 (5th Cir. 2020).

2. Landscape Consultants’ claims are properly pled. Like Metropolitan, whose equal protection claim MMD does not challenge, Landscape Consultants also properly pleads that MMD’s race-based bid program fails strict scrutiny because it does not serve a compelling interest in remediating a specific, identified racial constitutional or statutory violation and that its crude, overinclusive racial categories are not narrowly tailored. ECF No. 1 at ¶¶ 35, 57–62.

Plaintiffs properly pled a section 1981 claim by alleging that MMD intentionally operates a bid program that uses racial classifications to disadvantage nonminority contractors. ECF No. 1 at ¶¶ 36–37, 41–45. This precontract activity falls within section 1981’s protection to “make and enforce contracts” without respect to race. *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006).

3. MMD’s arguments do not support dismissal. *Jett v. Dallas Independent School District*, 491 U.S. 701, 733 (1989), does not preclude Plaintiffs’ section 1981

claim because Plaintiffs seek only forward-looking injunctive and declaratory relief. ECF No. 1 at 16–17 (Prayer for Relief). MMD identifies no case supporting its argument that Landscape Consultants must have an ongoing contractual relationship to bring a section 1981 claim. ECF No. 26 at 6–8. The cases MMD does cite are irrelevant; one involves a highly speculative claim that a high school athlete lost a hypothetical college scholarship because she was not promoted to varsity quickly enough, and the others pertain only to section 1981 claims brought in the retail context. ECF No. 26 at 7–8.

Contrary to MMD’s claim, ECF No. 26 at 9, a showing of discriminatory intent is not required in a facial equal protection challenge to race-based government programs. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Perhaps because of this, MMD does not cite a single race-based public contracting case in support of its argument; the two cases it does cite involving racial harassment and a racially-motivated attack on a student are completely inapplicable. ECF No. 26 at 9–10.

Defendant Midtown Management District’s Motion to Dismiss should be denied.

DATED: January 3, 2024.

Respectfully submitted,

Joshua P. Thompson*
Of Counsel
Cal. Bar No. 250955
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Fax: (916) 419-7747
jthompson@pacificlegal.org

**Pro Hac Vice*

s/ Erin E. Wilcox
Erin E. Wilcox
Attorney-in-Charge
Cal. Bar No. 337427
S.D. Tex. Bar No. 3369027
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Fax: (916) 419-7747
ewilcox@pacificlegal.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2024, I served this document via the Court's electronic filing system to the Defendants.

s/ *Erin E. Wilcox*
Erin E. Wilcox
Pacific Legal Foundation